

December 23, 2008

Randy Bates Director, Division of Coastal and Ocean Management PO Box 111030 Juneau, Alaska 99811-1030

Also via email randy.bates@alaska.gov

SUBJECT: Juneau Coastal District comments on proposed statutory (AS 46.39 and 46.40) and regulatory (11 AAC 110, 112, and 114) changes.

Dear Mr. Bates,

The purpose of this letter is to provide detailed comments on the proposed changes to the ACMP statutes and regulations, with the goal of restoring an effective, coordinated program. We appreciate DNR's willingness to address the concerns of the public, local districts, and agencies through a formal re-evaluation process.

Many of our comments relate directly back to our August 15, 2008 comments from the first stage of the re-evaluation effort. Rather than repeat those comments, we have attached that letter for your reference.

CBJ intends to oppose the proposed legislation unless the district role can be restored by allowing development and approval of meaningful district policies. We believe the proposed changes further restrict, rather than restore, important local district participation. Without meaningful district participation through district policies, the ACMP simply cannot be effective, not in a state with 44,000 miles of coastline and widely divergent local issues. A former state ACMP guidebook says it best in a paragraph heading: District Coastal Management Programs define the ACMP.

The proposed statutes and regulations contain some significant improvements to standards and review processes which we acknowledge. DNR has clearly taken great care to "repair" and clean up many sections of the statutes and regulations while preserving or improving the role of the public and reviewing agencies.

With these introductory comments, we will now address the proposed changes section by section.

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AS 46.39 Coastal Management Administration

Grant Authorization. CBJ recommends that all grant management authority for the ACMP and ACMP-related programs remain within the Department of Commerce, Division of Community and Economic Development, as it is now. This is because DCCED, and its predecessor DCRA, have decades of experience working directly with local governments, and also because this department does not issue permits, which avoids any conflict of interest. This is the same reason CBJ and others have suggested moving full management of the ACMP to this department.

AS 46.40 The Alaska Coastal Management Program

<u>District Policy Approval</u>. Sections 46.40.070 and 075 describe the new process for approval of district policies. CBJ strongly opposes the language in this section. We believe it will prohibit approval of the vast majority of district policies.

To illustrate this point, we'd like to review the example of a local 50-foot streamside setback policy from anadromous waterbodies, as we discussed at the ACMP conference. ADFG representatives have stated that they would support such a local policy because it augments fisheries protection in a valuable and necessary way. However under the proposed statutory changes, DCOM would not be able to approve this district policy because it falls outside of ADFG's authority, which ADFG describes as streambank to streambank. (If the policy did fall within ADFG's authority, DCOM could approve the policy only if ADFG wrote a letter specifically supporting the policy.)

Since the policy would be outside of ADFG's authority, policy review would then go to the state legislature, which would have to pass a bill specifically expanding ADFG's authority and specifically allowing DCOM to approve the local policy. This is not a solution. The legislative process is extremely cumbersome for even the most widely understood and supported bills. It is unreasonable to ask a local district to go through this process. Furthermore, it is unwarranted.

The purpose of district policies is to provide supported local review on important local issues. By requiring legislative action, local review is effectively eliminated and puts an unnecessary burden on the legislature. Requiring legislative action undermines municipal autonomy.

One key purpose of the ACMP is to coordinate an effective and streamlined permitting process for developers and industry. Not accepting a 50-foot setback policy into the Juneau Coastal Management Program when it is part of local regulation defeats this mission. Eliminating local policies in district plans does not eliminate local regulation. The developer simply has to go back to CBJ for another layer of review, uncoordinated with the rest. If a Planning Commission or other public hearing is required, CBJ Planning staff will be unable to predict what conditions will be required for permit

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approval. Therefore, without incorporation of CBJ habitat policies in the ACMP review, the developer risks having to start the whole review process over again.

More importantly, CBJ believes that districts should be allowed to establish enforceable district policies on any relevant coastal zone matter and in any manner unless it is specifically preempted by, or in conflict with, state or federal law. This is also in conformance with the Alaska constitutional mandate of maximum local governance.

<u>Performance and Prescriptive-based Policies</u>. CBJ recommends inclusion of performance as well as prescriptive-based policies in 46.40.030(b)(2). As described by many people at the ACMP conference, performance-based policies are strongly supported by industry as well as districts and offer the flexibility to meet a requirement through the most efficient means possible.

<u>Nationwide and General Permits</u>. CBJ supports the change in 49.40.096 which clarifies that only the aspect of the activity specifically authorized by the nationwide permit is predetermined to be consistent with the ACMP.

<u>Time limitations</u>. 46.40.096(o)(d) proposes that the ACMP review clock may not be suspended for more than 30 days to accommodate a public hearing by the local district. While CBJ respects the intent to move projects forward without unnecessary delays, this change does not account for delays by the applicant in providing the necessary information for Planning Commission review, nor does it consider public notice and agency review requirements in city code which require a longer timeframe for review. This change also does not consider that in some months, and in many rural communities across the state, the Planning Commission may meet only once a month.

Lastly, the change does not consider that some projects, such as those that require a zone change, require approval by both the Planning Commission and the CBJ Assembly, and the Planning Commission may require a second hearing if the information in the review is inadequate. There's simply no way that multiple hearings can be conducted within a month and comply with public notice requirements, even with full cooperation from the applicant. CBJ would like to work with DNR-DCOM to find an acceptable solution to this problem that promotes a timely review while also allowing full district participation. We believe that this section as currently written will exclude CBJ from submitting comments on many projects.

Finally, CBJ notes that the original ACMP Project Description from 2003, Section 3.4, specifically requires ongoing coordination with districts and agencies and requires review of local planning documents, which would include the CBJ Land Use Code. On page A25, the Project Description states:

Over the past 25 years as the program has been implemented, the day-to-day permit and consistency review process and the district planning, revision and

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amendment process require that the ACMP program interact with participating local, area wide and federal agencies on a regular basis. Through the program's networked approach, each participating or commenting body reviews the proposed projects and district plans against existing local, state, regional and federal planning documents [emphasis added] in place and effective during the particular review period. This networked consultation process with existing plans was in place on January 1, and did not change as a result of the revised regulations.

The ACMP Program Description clearly supports active local involvement and project reviews that address local issues and local planning documents. Statutes and regulations which address implementation need to confirm this goal.

<u>**DEC**</u>. CBJ supports the change in 46.40.040 which restores DEC's role in the review process except for air quality permits. This has been a high priority for CBJ and other districts, and we believe DEC's participation will vastly improve the coordination and effectiveness of the program. Unfortunately, DEC's inclusion does not automatically restore the local district's opportunity to write enforceable policies regarding air and water quality because of DNR's excessive restrictions on approval of district policies.

<u>Designated Areas</u>. CBJ supports the change which eliminates the requirement to designate Important Habitat areas in order to have habitat policies. Designated areas have been impracticable in many cases and have been a serious obstacle for districts in developing enforceable policies, yet this change by itself is not enough to restore the ability to write local enforceable policies unless the state lifts its other major restrictions on policy approval.

11 AAC 110 Alaska Coastal Management Program Implementation

General Comments. CBJ appreciates DNR-DCOM's extensive efforts to promote better consultation between coastal districts and agencies throughout this chapter. This is an extremely important issue for Juneau and we are pleased that this issue has been addressed. Similarly, we appreciate the changes to 11 AAC 110.240(c)(2) and other areas which clarify that information with sufficient supporting evidence may be considered in the review regardless of its source. This is a significant improvement to the program.

11 AAC 112 State Standards

General Comments. CBJ supports the overall change to the program that allows reviewers to address the entire coastal area, rather than just coastal water. However in some areas subject areas still appear to be limited, which we will address later in these comments. We support changes to the definition section and other areas which allow consideration of freshwater wetlands as well as saltwater; this is a significant improvement and a high priority for CBJ.

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11 AAC 112.300 Habitats. CBJ appreciates and supports the inclusion of additional management criterion in this section, such as nutrients, oxygen levels, and discharge of toxic substances. These additions address important issues lacking in the previous standard. However we are very concerned about eliminating important habitat from the list of habitat areas unless upland habitat is added. Without upland habitat, the ACMP cannot meet the objective of addressing impacts to the coastal area; this leaves a serious gap.

At the ACMP conference, DNR explained that important fisheries habitat is included under the definition of competing uses. We believe this reference is too obscure for such a critically important issue, and we recommend that Important Fisheries Habitat be specifically listed under all habitat categories as it is under the Rivers, Streams, and Lakes section. If DNR needs to define Important Fisheries Habitat, the federal definition of Essential Fish Habitat may be useful and would provide compatibility with other agency reviews such as NOAA and the U.S. Army Corps of Engineers.

CBJ supports the change which includes contiguous freshwater wetlands in the definition of riparian management areas. We recommend that this definition include non-anadromous as well as anadromous waters.

CBJ spoke in favor of adding the 3-part exception test to Habitat Standard in our earlier comments, but we now recommend deleting it. The 3-part test was effective in previous iterations of the Habitat Standard because it was applied in conjunction with the requirement to "maintain and enhance" habitats. Without the "maintain and enhance" language, the 3-part test grants an exception to a weaker standard, which we cannot support.

Mining. Mining should be restored as part of the ACMP as a separate standard. While we understand that mining is still reviewed under the ACMP, simply applying other standards to mining developments is not enough. The mining standard should include an allowance for local districts to write mining policies that do not duplicate or conflict with state or federal laws.

11 AAC 114 District Coastal Management Plan Requirements

<u>General Comments</u>. CBJ supports eliminating the designated area requirement for recreation, habitats, and other categories. We also appreciate the statement at the conference that districts can retain currently adopted plans and will not be required to modify these plans by a deadline to meet new proposed statutes and regulations.

New District Plans. The proposed changes for approval of new district plans, outlined in 11 AAC 114.302 and subsequent sections, are an improvement. The changes eliminate a significant amount of excess paperwork while preserving an open public review process.

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However, the legislative review process to appeal the denial of district policies, as outlined in 11 AAC 113.347, is clearly untenable for the reasons we described earlier. The current changes may result in an even more severe limitation of district policies than the widely-opposed 2003 legislation.

Mediation. CBJ opposes the proposed elimination of the mediation process outlined in 11 AAC 114.350, which is also eliminated from statute in 46.40.060. While mediation is not necessarily a pleasant process, it offers greater potential to resolve problems (and therefore avoid lawsuits), than reconsideration. Based on the explanation offered at the December ACMP conference, reconsideration offers only a second look at the issues by the DNR Commissioner. It's reasonable to assume that on any controversial issue, the DNR Commissioner would have already been involved in the initial decision. A second look from the Commissioner at reconsideration would offer nothing new. Though mediation can be time-consuming, it has the distinct advantage of intervention by a neutral third party and is far more likely to be successful. Lastly, eliminating mediation in favor of reconsideration further consolidates power in the DNR Commissioner's office, which is the exact opposite of what local districts have requested.

<u>District Enforceable Policy Subject Areas</u>. CBJ is puzzled by sections of the changes that clearly allow district policies to address impacts to the entire coastal area when the Habitats addressed under the Habitat Standard fail to include uplands, as well as non-anadromous waters. Similarly, districts cannot directly address mining since there is no mining standard. We believe these restrictions are a contradiction and fail to meet the ACMP Objectives. However the most formidable obstacle for addressing impacts to the coastal area is still the state's unreasonable, and we believe unjustifiable, interpretation of state authority which would eliminate most district policies.

Other Issues

Home Rule and Title 29 Authority. CBJ respectfully requests that DNR and/or the State of Alaska Department of Law provide a full legal analysis of what appears to be a novel "state authority" doctrine reflected in the proposed legislation. The stakeholders and public are entitled to an analysis of how the proposed changes, including increased state ACMP authority, will impact constitutionally-based home rule powers and Title 29 authority. CBJ believes the state's approach should be closely scrutinized as it could have far-reaching ramifications beyond the ACMP.

<u>Identify v. Designate.</u> While we are pleased with the proposed elimination of the designated area requirement, we note that this term has been replaced with "identify." We request an explanation of what "identify" means in terms of requirements for local districts.

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Coastal Policy Council. CBJ would like to repeat our support of a Coastal Policy Council to allow more diverse representation and decision-making in the ACMP. The current proposal further consolidates DNR authority and continues to damage the relationship between the state and local districts, which is unfortunate for all parties. We believe that a properly managed CPC could help repair that relationship and restore a more open and responsive decision-making process. DNR's current approach of using the state legislature as a decision-making body on controversial issues is unnecessarily cumbersome and time-consuming.

In closing, CBJ would like to acknowledge that the relationship between DNR and local districts has been seriously compromised since 2003. We'd like to turn that around. CBJ has put tremendous time and effort into the ACMP since its inception. We have always been an active participant in the ACMP Working Group and most recently in the series of stakeholder meetings. We want this program to work, and we want to restore trust and cooperation between DNR and local districts. Restoring trust begins with allowing CBJ and other districts to have a meaningful role in the program with meaningful local district policies. Once that groundwork is in place, we believe we can work together for an effective and efficient program.

Thank you for the opportunity to comment.

Sincerely,

Teri Camery, Planne

CBJ Community Development Department

cc:

Rod Swope, City Manager

Kim Kiefer, Deputy City Manager

John Hartle, City Attorney

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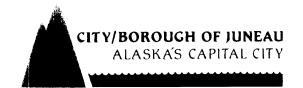
Dale Pernula, Community Development Department Director

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Attachment:

August 15, 2008 CBJ ACMP Re-evaluation Comments

ATTACHMENT A



August 15, 2008

Randy Bates
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SUBJECT: Alaska Coastal Management Program Re-evaluation

Dear Mr. Bates,

The purpose of this letter is to provide detailed comments on the ACMP Re-evaluation, with the goal of restoring an effective, coordinated program. We appreciate DNR's willingness to address the concerns of the public, local districts, and agencies through a formal re-evaluation process, and we hope this is the beginning of a pro-active relationship among all parties to address those concerns.

From CBJ's perspective, the ACMP's most valuable role is in facilitating a complete and coordinated review process among all reviewing agencies and the applicant. This allows all government agencies to address various project concerns together, with the applicant, for a complete review that considers all issues in one package. When the ACMP process works as it should, the result is an amicably negotiated, environmentally sensitive project developed under coordinated permit timelines. This coordinated process also saves the applicant significant time and money, versus the alternative of going through each permit process separately.

For CBJ, an effective coordinated review process is dependent on a local coastal management program that complements local coastal management regulations in city code. When the local program and local code have different policies, the applicant must go through one coastal review process through the ACMP, and another in local code. This compromises the review process and adds review time and expense for the applicant. Similarly, an effective coordinated review process is dependent on local policies and complete statewide standards that allow for a comprehensive review, so problems are not discovered later.

Lastly, an effective coordinated review process is dependent on communication. It requires notification among agencies, and a commitment to participation in the program at all levels. Alaska's constitution in particular calls for maximum local governance, and CBJ believes that full local participation is critical to the success of the ACMP.

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This is our vision for an effective program. CBJ believes that the ACMP has been seriously compromised as a result of the statutory and regulatory changes of 2003 and 2004. We seek to restore the program's effectiveness through improved coordination with stronger local policies, stronger state standards, and full participation at all levels. All of our ACMP re-evaluation comments flow from (but do not duplicate!) these basic themes.

In accordance with these themes, we have six priorities for change in the program:

- 1) Local policy requirements. ACMP statutes should confirm that local districts may have policies when a state or federal law does not adequately address an issue.
- 2) Designated Areas and Local Policies. The requirement that Habitat, Recreation, and other types of policies can only be used with designated areas should be eliminated. Designated areas by themselves should be maintained.
- 3) Additional Emphasis on Agency Participation and Notification Requirements. The statutes and regulations should be clear that state and federal resource agency coordination is required and necessary for effective implementation of the ACMP. Regulations should state clearly that DNR-DCOM has authority to decide when a General Consistency Determination applies. Regulations should also state clearly that agencies are required to give notice to coastal districts on all projects.
- 4) The DEC-Carve Out. DEC should be reinstated into the program as a reviewing agency, and DEC standards should be included in the statewide standards. Districts should be allowed to have air and water quality policies that do not duplicate DEC statutes and regulations.
- 5) Habitat Standards. The wetland standard should be modified to address freshwater wetlands. Standards should be developed to address important upland habitat and important fisheries habitat. The three-part exception test should be reinstated. All habitat standards should take a more comprehensive approach.
- 6) Mining, Sand and Gravel. Mining should be restored as part of the ACMP, including establishing statewide standards and allowing local districts to write mining policies that do not duplicate state or federal laws. The Sand and Gravel standard should be amended to ensure its application to freshwater operations, as well as saltwater.

In addition to these major concerns, we recommend the following changes:

7) Confirm that due deference on consistency review comments will consider all evidence. The due deference definition and 11 AAC 110.250(b) should be changed to confirm consideration of all factual evidence.

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- 8) Establishment of the Coastal Policy Council. The CPC should be reinstated with a streamlined board that represents coastal districts, state resource agencies, and the Division of Community and Regional Affairs.
- 9) Transfer of the ACMP to the State Department of Commerce, Community, and Economic Development, DCRA. The ACMP should be relocated to DCRA to confirm support for local governments.
- 10) An Open Revision Process and Additional Funding for Local Plan Changes. Changes that allow new district policies should establish a new plan revision process without strict deadlines for completion, and additional funding should be provided to districts if possible.

Each of these items will now be addressed in detail. Though we will not be using the suggested comment template, we will address the template headings as much as possible to identify solutions, affected parties, and specific statutes and regulations.

1) Local policy requirements

The original changes to the ACMP intended to correct the common problem of local districts simply repeating state standards, as well as other statutes and regulations. This was reasonable, because the duplication in authority was unnecessary and set the stage for conflict in interpretation of those statutes. However the state's new regulations, as well as the interpretation of those regulations, have gone far beyond the original intent. The end result has been a drastic decline in district policies and participation. This is contrary to the coordinated and complete review, with full local participation, which is necessary for an effective program.

Some of the criteria for development of local policies actually appear mutually exclusive. It's a nearly impossible task, for example, to demonstrate that a policy flows from a state standard but is nonetheless a uniquely local issue. Similarly, it is difficult to document that a policy does not duplicate nor infringe upon a state authority, but is nonetheless complementary to it. These criteria, under current interpretations, have eliminated many policies in the Juneau Coastal Management Program, and also led to a lengthy and costly mediation process before the Juneau Wetlands Management Plan policies could be approved. CBJ believes that many of these problems can be corrected with some relatively minor changes, which we outline below.

"Adequately Addressed." The current statute (AS 46.40.070) and DNR's Program Description allows districts to have policies when a state or federal law does not adequately address a matter. However DNR's interpretation of this statute has varied considerably from district to district, and in many cases DNR has not approved policies addressing matters over which an agency has authority, even if there are no applicable

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statutes or regulations. This is contrary to the intent of the original 2003 legislation and the Administration's promises to the legislators at the time, who were assured that districts would be able retain meaningful local policies. Section 46.40.070(a)(2)(C)(ii) should be amended to clarify that the adequately addressed criteria applies to a specific law, not to the ability of an agency to write a law.

"Unique Concern." The requirement that district policies must address a "unique concern," with full documentation, is unduly burdensome and an unreasonable criteria for developing local policies. The fact that a local district is willing to go through both state and local approval processes, with public hearings and public comment periods at each stage, documents the importance to the local community. In addition, many districts, especially those in similar regions such as Southeast Alaska, share many concerns, therefore it's impossible to document those concerns as "unique." To facilitate greater local participation in the ACMP and greater flexibility in developing local policies, the unique concern test must be eliminated.

"Flow From." DNR has approved only polices that "flow from" specific matters addressed in a statewide standard. While the regulations restrict polices to "use and activities" identified in statewide standards or designated areas, they do not limit policies to the specific aspects of uses or activities mentioned in the statewide standard (11 AAC 114.270). Limiting the scope of enforceable policies in this manner restricts district policies and district involvement unnecessarily. Statutory changes are necessary to clarify the intent of the Legislature to allow districts to write policies.

"Allow/Disallow." In many cases, DNR has approved only policies that allow or disallow activities for matters covered by the Habitats and other standards. Neither the statutes nor the regulations support this interpretation. This interpretation also forces districts into developing black and white, unreasonable policies which do not allow for any evaluation and consideration of unusual circumstances. This serves neither applicants nor districts. To address this problem 11 AAC 112.900 needs to be changed to clearly indicate that a local district may restrict a use without abolishing the use.

2) Designated Areas and Local Policies

The requirement to have designated areas for all important habitat puts an enormous technical and financial burden on local districts to provide the required mapping and scientific analysis. As a consequence, many districts have lost important policies. For example, both the City and Borough of Juneau and the City and Borough of Sitka have lost streamside setback policies, which are critically important to the health of salmon streams. The requirement for designated areas also ignores the fact that many habitats are constantly in transition, such as eelgrass, so accurate mapping is impossible. To support a complete review with local participation, habitat policies should apply to the identified resource whether it has been formally mapped in advance or not. The National Marine

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Fisheries Service, U.S. Army Corps of Engineers, and many other state and federal agencies use this approach; it is counter-productive for the ACMP to do otherwise.

The requirement that Habitat, Recreation, and other types of policies can only be used with designated areas should be eliminated. However, designated areas by themselves should be maintained. Designated areas can be useful tools for local districts, as well as state agencies, for identifying sensitive areas in advance for long-range planning efforts. Designated areas can also be useful tools for promoting development, such as CBJ's preapproved Waterfront Development Areas. Districts should be provided with funding and assistance to expand designated areas where it makes sense. Similarly, districts should also retain the ability to establish Areas Meriting Special Attention and Special Area Management Plans.

Citations. The designated area requirement should be removed in 11 AAC 114.250, 11 AAC 114.270, 11 AAC 112.210 (hazards), 11 AAC 112.270 (subsistence), 11 AAC 112.300 (important habitat), and 11 AAC 112.320 (historic areas).

3) Additional Emphasis on Agency Participation and Notification Requirements.

The statutes and regulations should be clear that state and federal resource agency coordination is required and necessary for effective implementation of the ACMP. Regulations should state clearly that DNR-DCOM has authority to decide when a General Consistency Determination applies. Regulations should also state clearly that agencies are required to give notice to coastal districts on all projects. This is necessary for a complete and coordinated review with full local participation.

As we note throughout our evaluation comments, agencies have often failed to notify districts, and agencies have not fully implemented the existing standards. For example, in a salmon stream gravel extraction project, DNR-Habitat approved an "emergency" gravel extraction through an expedited ACMP General Consistency Determination without first notifying DCOM and CBJ. DCOM was authorized to make the decision on whether the proposal met the requirements for a General Consistency Determination, not DNR-Habitat, and the emergency gravel extraction was not allowed under CBJ Code. However the gravel extraction was approved by DNR-Habitat without further notice. This approach denied local participation and resulted in an incomplete review.

Notification requirements need to be emphasized in statutes and regulations whenever possible. At the departmental level, DCOM needs to educate review participants on those requirements, and also enforce those requirements.

4) The DEC Carve-Out

Separating DEC from the review process has resulted in a litany of problems for applicants, agencies, and districts. It is impossible to have a complete and coordinated

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review of coastal management issues without addressing air and water quality, since air and water quality is an integral part of any assessment of habitat impacts.

DEC management of impaired waterbodies is important to CBJ because CBJ has five impaired salmon streams. Every project review that is in or adjacent to one of these streams requires a thorough consultation and review with DEC, and that coordinated review has ceased or has been seriously compromised since the 2003 ACMP changes.

DEC has sole authority over development and project compliance with Total Maximum Daily Load (TMDL) documents for impaired water bodies. Within CBJ there are five impaired water bodies, so concerns with project compliance with TMDL documents arise on a regular basis. In one development, an ACMP review for gravel extraction in an impaired salmon stream (separate from the emergency gravel extraction described earlier) went through the full ACMP process with a favorable consistency determination. After this review process was completed, DEC concluded that the project did not conform with the TMDL document. DEC did their job as required, but the agency should have been an integral part of the coordinated ACMP review, to work with the applicant and other agencies to address these issues in the project description from the beginning. DEC's role in this process needs to be restored.

CBJ understands that DEC was removed from the process because of the timing of DEC permits. To find a solution to the timing problem, DCOM and DCED should review DEC regulations to determine exactly which DEC permits create the problem, and consider revising DEC permit timelines if necessary. The timing problems with these permits do not justify an incomplete review and obstacles for applicants and agencies when DEC is removed from the process.

Lastly, restoring DEC as a reviewing agency in the ACMP would greatly improve consideration of air and water quality issues, yet by itself, this measure doesn't go far enough. Statewide air and water quality standards need to be included in the ACMP to insure a complete review, and also to allow local districts and other reviewing agencies to address those standards in their comments. Similarly, coastal districts should be allowed to develop local air and water quality policies that do not duplicate the state standard or DEC statutes or regulations.

Citations. To restore DEC's role in the ACMP, amend AS 46.40.040(b)(1), AS 46.40.096(g)(i), and (k). Also repeal regulations associated with the carve-out. Amend 11 AAC 114.270(f) to clarify that districts can establish policies that do not duplicate DEC statutes and regulations.

5) Habitat Standards

The 2003 changes in the Habitat Standard have left many gaps in coverage, and the ACMP no longer provides a complete review of habitat issues. These gaps also result in

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an inefficient, uncoordinated review process because CBJ Land Use Code habitat and coastal development policies must be reviewed through a separate process.

Wetlands. The legislative objectives in AS 46.450.020 indicate that the ACMP is intended to address the entire coastal area, and federal approval of the original program found that activities in all areas of the coastal zone could have a direct and significant impact on coastal waters. However the 2004 regulations conflict with this statute because they limit applicability of the standards to a very narrow part of the coastal zone.

For example, the wetland standard, included in 11 AAC 112.300(a)(3) and (b)(3), limits the review to avoiding, minimizing, and mitigating significant impacts to waterflow and drainage patterns. In combination with 11 AAC 112.300(B)(i) and the definition of coastal water and wetlands (11 AAC 112.990), the wetland standard only addresses saltwater wetlands, not freshwater wetlands. The importance of freshwater wetlands for both environmental purposes (protection of salmon habitat and water quality) and economic purposes (reduction of flood risk) is well-documented.

As an example of the problem with the standard, the Juneau Coastal District and DNR-Habitat recently reviewed a proposal for residential wetland fill. The applicant proposed fill of most of a .57 acre lot for a large home, workshop, and full lawn. The lot was located near a salmon stream, and approximately 200 yards from the shoreline. And yet DNR-Habitat concluded that the wetlands had no direct link to coastal water according to the definition, and recommended approval of the proposal without changes. The National Marine Fisheries Service recommended denial of the Corps permit, and the Juneau Coastal District, while unable to oppose the project because of the limitations of the ACMP, stated that the proposal would be need to be significantly modified before a local grading permit could be issued. The proposal failed to meet even basic requirements for minimizing wetland fill, and yet under the current ACMP standards, it received a favorable consistency determination because the standard. The Corps of Engineers has asked the applicant to revise the proposal and has not yet approved the permit.

To summarize, the state's wetland standard is ineffective because it fails to address freshwater wetlands. It is also ineffective, inefficient, and incomplete because it forces CBJ's habitat review to take place separately through the CBJ Land Use Code and the local grading permit, rather than through a coordinated review process. Most of all, it is unreasonable and confusing for the applicant.

Upland Habitat. The current Habitat standards have eliminated the former Important Upland Habitat category as a subject area of the program. From an ecosystem or watershed-based approach, this is unreasonable. Shoreline areas, salmon streams, and other coastal areas cannot be separated from the upland habitats which provide water sources, filtration, nutrient export, and other functions. The Habitat Section should be revised to include Important Upland Habitat, which may be identified by the local district

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or state or federal resource agencies with supporting evidence. This is necessary for a complete review.

<u>Citations</u>. Important Upland Habitat should be added as a subject area in 11 AAC 112.300, Habitats.

Fisheries Habitat. The Habitat Standard needs to include a separate standard for important fisheries habitat to facilitate a complete and coordinated review. Currently none of the standards in the ACMP allow local districts, nor state agencies, to address common but important issues such as spawning and rearing grounds for salmon, eulachon, and herring. For example, the recent review of the Cascade Point Barge Ramp was entirely focused on how the project design could affect important herring spawning habitat and migration routes in the area. And yet ADFG's comments, as well as the comments of the Juneau Coastal District, could only review the project for conformance with standards regarding tideflats, estuaries, and offshore areas. None of these standards accurately reflected the rocky shoreline habitat under review, and none of the review parameters of those standards (avoid, minimize, and mitigate adverse impacts to water flow and circulation, and competing uses) allowed reviewers to address the central issue: whether timing requirements and design modifications were necessary to protect the impaired herring run. ADFG's comments on herring were relegated to advisory comments, and the Juneau Coastal District's extensive review of herring was also categorized as merely advisory.

CBJ highlights this case as another example of where the current ACMP fails to facilitate a coordinated review. CBJ conducted a full review of habitat policies in the CBJ Land Use Code which could not be considered under the current ACMP. Developing a Fisheries Standard would be a positive step towards a complete and coordinated review.

<u>Citations</u>. Important Fisheries Habitat should be added in 11 AAC 112.300, Habitats.

Rivers, Streams, and Lakes, and Riparian Management Areas. CBJ calls your attention to the Rivers, Streams, and Lakes standard because in our experience, state agencies have not been implementing this standard. The standard calls for avoiding, minimizing, and mitigating significant adverse impacts to natural water flow, active floodplains, and natural vegetation within Riparian Management Areas. The definition of Riparian Management Area provides buffer widths ranging from 500 to 100 feet of the waterbody depending on the type of stream.

CBJ was not able to retain streamside setback policies in the final approved Juneau Coastal Management Program because of the state's difficult designated area regulations. We continue to enforce our 50-foot streamside setback policy in CBJ code through a separate, uncoordinated review process. In ACMP reviews we rely on the state standard to address this critical issue. However since the ACMP changes of 2003, most state

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reviews on projects within stream buffers have given little or no mention of this standard, and project evaluations have suffered as a result.

Since 2003, the state's position has been to tell districts that local policies often aren't necessary because the state "has it covered." As we have described, many issues are not covered, sometimes due to gaps in the standards, and sometimes from lack of implementation. On Rivers, Streams, and Lakes, we encourage DCOM to actively work with state agencies to educate them on the regulations and also to ensure adequate staffing so project reviews fully address the standards. And as described earlier, we seek greater allowances for developing local policies so our streamside setback policy can be in the coastal management program where it belongs, as part of a coordinated review process with other agencies.

General Habitat Standard issues. All of the individual habitat standards had major changes in 2003, and we believe many of these changes have had negative impacts. The different habitat categories have many problems in common, which we will address here.

As noted earlier, all habitat standards need to address water quality in their review components to insure a complete, coordinated review. DEC issues cannot be removed or compartmentalized without serious compromises for project reviews.

In addition, DNR currently relies on the terms "avoid, minimize, and mitigate" for evaluation of habitat impacts. However this sequence largely fails to address impacts because it relies on the definition of "practicable," which refers only to economic considerations, including cost, technology, and logistics. The mitigation component is also inadequate because it prohibits the use of compensatory mitigation.

The "avoid, minimize, mitigate" sequence should be replaced with the former requirement to "maintain and enhance" habitats, "where feasible and prudent." These key phrases would help facilitate the change from a piecemeal habitat review to a broader, ecosystem-based review that can address the full range of impacts. Biological, physical, and chemical aspects of projects can be quantified, and maintaining or enhancing habitat is a realistic objective for projects after full consideration of siting and design options. The proposed three-part test, described below, would allow exceptions for projects that cannot meet the standard.

Rather than review all projects through the "avoid, minimize, mitigate" sequence, projects which cannot meet basic standards should utilize the "three-part test" from the previous program. This test would allow projects which could not meet the standards to go forward if 1) there is significant public need for the proposed use or activity [deference would go to the local district for determining the need]; 2) there is no feasible or prudent alternative to meet the public need; and 3) all feasible and prudent steps to maximize conformance with the standards have been taken.

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The Alaska Glacier Seafoods plant in Juneau is a project that was approved using an identically worded three-part standard in the CBJ Land Use Code. The project was modified to the greatest extent possible to minimize impact, mitigation efforts were approved, however the project still had significant impacts to eelgrass. Yet the development was approved because of demonstrated public need and maximum compliance with the standards.

This standard worked well in the past because it provided a good system of checks and balances. It allowed projects with high public demand to go forward, even with additional habitat impacts, if the applicant took all reasonable steps to comply, and even if mitigation could not be identified for the project. This is the rare standard that allows for both maximum development and maximum environmental protection in a complete, coordinated review. The current standards offer none of these benefits.

6) Mining, Sand and Gravel

CBJ recognizes that mining is a significant industry for the state, and the industry continues to expand due to high mineral prices. However mining often has considerable impacts on water quality and habitat, and requires careful evaluation. This careful evaluation is not happening under the ACMP since the 2003 legislation removed mining from the program. This has resulted in limited review participation by local districts, and has the potential to result in an inadequate evaluation of project impacts.

Mining should be restored as part of the ACMP under the Sand and Gravel Standard (11 AAC 112.260) or as a separate standard. This should include an allowance for local districts to write mining policies that do not duplicate state or federal laws.

Lastly, the Sand and Gravel Standard should include the term "freshwater" to confirm that it applies to all operations within the coastal zone that can affect coastal uses and resources. Once again, these changes are necessary for a complete and coordinated review.

7) Confirm that due deference on consistency review comments will consider all evidence.

It is not possible to have a complete review without full consideration of evidence, and yet certain regulations don't appear to support a full review. The due deference definition and 11 AAC 110.250(b) should be changed to confirm consideration of all factual evidence.

11 AAC 110.250(b), Review Participant Comments, states that:

"In a consistency review comment, a review participant may address an enforceable policy outside the review participant's expertise or area of responsibility. However, the coordinating agency may not give a resource agency or coastal resource district due

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deference for comments outside that agency or district's expertise or area of responsibility."

The definition of due deference in 11 AAC 110.990(25) states that:

"due deference means that deference in appropriate in the context of

- (A) the commentor's expertise or area of responsibility; and
- (B) all the evidence available to support any factual assertions of the commentor:

It appears that according to the regulations, even if a local district has strong evidence to support factual assertions on a project review, the local district cannot be given deference if the evidence is outside of the district's expertise or area of responsibility.

For a complete project review, the emphasis needs to be on factual evidence, not the entity that the information comes from. If the evidence can be supported, it should not be rejected simply because it is outside of the commenter's area of expertise. It is also unclear who would judge what is in the area of expertise. As the Juneau Coastal District, our reviews gather detailed, scientifically supported evidence from a variety of sources. That evidence should not be rejected because the entity that delivers the comments does not in itself have that particular area of expertise or responsibility.

8) Establishment of the Coastal Policy Council

The CPC should be reinstated, and should include a streamlined council which incorporates representation from coastal districts, state resource agencies, at DCCED Division of Community and Regional Affairs. The Council should have authority to approve coastal district plans, approve program changes, address elevations, and approve program related-funding. Establishment of the Board would allow for a more equitable decision-making process and could eliminate the lengthy appeal processes which led to a two year mediation effort by CBJ.

9) Transfer of the ACMP to the State Department of Commerce, Community, and Economic Development, DCRA.

The problem with having the ACMP located in DNR-DCOM is that other branches of DNR have permits which may be included in ACMP reviews, which could result in a potential conflict. DNR also lacks a department-wide emphasis on individual communities and districts throughout the state. Moving the ACMP to DCCED, Division of Community and Regional Affairs, would resolve the permitting conflict, since DCCED does not issue any permits. DCRA would then be the ideal agency division to implement the program because it already manages the ACMP grants and because it has a statutory mandate to provide planning assistance to coastal resource districts for coastal management plans, as described in AS 44.33.781. DCRA also has a long history of program implementation and support for local governments throughout the state, such as the National Flood Insurance Program.

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In the NOAA/OCRM June 2008 ACMP Evaluation, OCRM listed a program suggestion as follows:

OCRM encourages the ACMP to improve communication with coastal districts to rebuild relationships and support their participation in the Program. This will likely need to include a focused outreach strategy and coordination with a number of program partners.

DCCED-DCRA is in the perfect position to fill exactly this role, and would bring balance and a new level of public trust to the program after the controversies of the past five years. Transfer of the ACMP to DCCED-DCRA would inevitably create some initial problems with re-organization, new forms, etc., but those problems would be minor if a physical office move could be prevented.

10) An Open Revision Process and Additional Funding for Local Plan Changes.

CBJ hopes that the ACMP Re-evaluation process will result in revised legislation and regulations which will allow districts to develop more meaningful local policies and fully participate in the program. And yet we do not wish to repeat the arduous and expensive revision process that we just completed as a result of the 2003 legislation. We therefore request that changes which allow new district policies also establish a new plan revision process that does not have strict deadlines for completion. We also request that additional funding be provided to districts whenever possible to support those revisions. We understand that the CIAP grant has risen from the predicted \$1.5 million to \$17-25 million, a huge increase. Ideally, a portion of these generous funds could be offered to districts through competitive or non-competitive grants to fund new district plan revisions, as well as ACMP personnel costs to review those revisions.

In conclusion, the ACMP fills a critical role in facilitating a coordinated, complete review process with all agencies, and the ACMP has been extremely valuable to CBJ since we first joined the program in 1986. We appreciate the opportunity to comment, and we look forward to continued involvement through the re-evaluation process.

Sincerely,

Teri Camery, Planner

CBJ Community Development Department

cc:

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